Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street,
SW Room TW-B204
Washington, DC 20554

July 17, 2017

Re: Comments in Support Proposed Rulemaking *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108

Dear Secretary Dortch,

The American Legislative Exchange Council (ALEC) is the nation's largest voluntary membership organization for state legislators. Roughly 25 percent of all state legislators are members. The ALEC mission is to "increase individual liberty, prosperity and the well-being of all Americans by promoting the principles of limited government, free-markets and federalism."[1]

ALEC submits this comment in support of the Commission's decision to Restore Internet Freedom by reversing the prior, 2015, classification of internet service providers (ISPs) as Title II telecommunications service providers.[2]

ALEC is uniquely positioned to provide the state perspective, including the competency of state consumer protection laws and the regulatory environments ISPs faced in each state. Stated succinctly from the perspective of state legislators, returning to a Title I, light-touch regulatory regime is ideal as it balances existing state laws and avoids unnecessary confusion created by the Title II Order.

Introduction

In the NPRM, the Commission sought comments on whether state consumer protection regimes, as they stood prior to the Title II Order, were insufficient to address isolated incidents of hypothetical harm.[3] A survey of state consumer protection laws establishes that the existing state regulatory regimes were, and are, sufficient to address any hypothetical harms consumers may face.

State consumer protection entities, whether they are part of a state's attorney general's office, an independent agency, or part of the state's utility commission are able to respond to individual complaints against individual ISPs and edge service providers.

[1] ALEC Strategic Plan, *available at* https://www.alec.org/app/uploads/2016/06/ALEC-Strat-Plan-Final-051616.pdf.
[2] *In the Matter of Protecting and Promoting the Open Internet,* Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (the "Title II Order").
[3] *E.g.,* Docket No. 17-108 ("NPRM") at paras. 39, 50.

The prior Title II Order also failed to address the consequences in states of classifying internet service providers as common carriers or telecommunications services. The Commission has the opportunity to examine state laws and how reclassifying service providers under Title I will provide greater certainty to states and providers within states.

State consumer protection laws sufficiently protects consumers from actual, concrete harms and offer sufficient protections against the Title II Order's hypothetical harms[4]

Restoring the Title I Information Service categorization to broadband service providers represents an opportunity to highlight the role of state consumer protection laws. It is worth noting the Title II Order may not entirely preempt state consumer protection laws,[5] though for a limited number of states the classification of internet service providers as a Title II common carrier may cause problems.[6]

State consumer protection laws have likely not changed since the Title II Order. That is the point, though. Regardless of whether the Title II Order pre-empted or altered consumer protections standards, or whether the Title I Information Service classification is restored, *the state and federal regulatory environment is sufficient to protect consumers against actual and hypothetical harms*.

States and the federal government share joint, and often concurrent, consumer protection jurisdiction.[7] State consumer protection laws, generally, fall into one of two broad categories: Those that prohibit unfair and deceptive practices; and Those that proscribe deceptive trade practices.[8] All states have laws proscribing deceptive trade practices,[9] while a small number of states also have laws proscribing unfair trade practices.[10]

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[4] NPRM at para. 50; *see also* Title II Order, 30 FCC Rcd at 5607-5608, paras. 15-19, 32, Hypothetical harms include blocking, throttling, and paid prioritization.

[5] *See* Title II Order, 30 FCC Rcd at 5804, para. 433. The Title II Order focuses on state regulation of broadband access activities rather than on states' consumer protection activities. In fact, the Order acknowledges the dual federal/state roles in overseeing broadband.

[6] *See infra* for a discussion regarding state regulation of broadband access. For the time being, though, it is worth noting that Alabama and Ohio both exempt utilities from their consumer protections statutes (Ala. Code § 8-19-7(3) and Ohio Rev. Code § 1345.01(A), respectively). Alabama may exempt broadband services from state regulation, but its law also provides that the state commission may not impose obligations "that exceeds in degree or differs in kind from the requirements of the Federal Communications Commission." Ala. Code § 37-2A-4(a). Ohio, on the other hand, specifically includes providers of advanced services, information services, and broadband services within the regulatory ambit of its utilities commission. Oh. Rev. Code § 4905.02(A)(5)(a)-(e).

[7] E.g. Waller, Spencer Weber, Jillian G. Brady, and R.J. Acosta, *Consumer Protection in the United States: An Overview*, available at http://www.luc.edu/media/lucedu/law/centers/antitrust/pdfs/publications/workingpapers/USConsumerProtectionFormatted.pdf (Waller, *Consumer Protection in the United States*)

[8] *E.g.* Carter, Carolyn L. *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes*, February 2009, National Consumer Law Center, Inc., available at https://www.nclc.org/images/pdf/car_sales/UDAP_Report_Feb09.pdf (Carter, *50-State Report*).

[9] "Consumer Protection: An Overview of State Laws and Enforcement", 2010, Public Health Law Center at William Mitchell College of Law, available at http://www.publichealthlawcenter.org/sites/default/files/resources/phlc-fs-agconsumer-2010.pdf.

[10] Carter, *50-State Report* at p. 12.

The former point—that all states prohibit deceptive trade practices—is critical. Assuming it is possible to properly define the hypothetical harms, wherever service providers have pledged not to engage in blocking, throttling, or paid prioritization practices,[11] those promises may be considered actionable representations. As consumer-facing representations, despite statements to the contrary,[12] state and federal consumer protection agencies may be able to enforce violations of these promises, should they actually arise.

The Federal Trade Commission possesses the authority to protect consumers from unlawful "unfair or deceptive acts or practices in or affecting commerce."[13] Prior to the Title II Order, this provided the FTC broad enforcement jurisdiction against ISPs, mobile broadband providers, and other internet-related businesses.[14] A month before the Title II Order the FTC announced, for example, a settlement with TracFone Wireless[15] regarding allegations that the mobile phone service provider "broke the 'unlimited data' promise it made to millions of customers by substantially reduced [sic] the speed of their service if customers went over certain fixed limits in a 30-day period."[16] The FTC brought a similar action against AT&T in late 2014.[17] Since the FCC finalized the Title II Order in February 2015, at least one appellate court determined the common carrier exception may remove AT&T from the FTC's jurisdiction.[18]

States are free to bring their own enforcement actions, often through their state's attorney general, against providers that violate representations made to consumers.[19] State consumer protection laws may also permit private causes of action brought by disaffected consumers or companies.[20] States may elect to follow FTC standards for deceptive trade practices or they may craft their own standards.[21] Some states have elected to follow the FTC standards of the 1980s, which defines unfairness as "conduct that 'offends public policy,' 'is

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[11] *See e.g.*, public representations from Comcast (http://corporate.comcast.com/comcast-voices/fcc-begins-rulemaking-process-to-protect-an-open-internet), Frontier (https://frontier.com/~/media/resources/policies/network-management-policy.ashx), AT&T (https://www.attpublicpolicy.com/open-internet/why-were-joining-the-day-of-action-in-support-of-an-open-internet/), Verizon (http://www.verizon.com/about/news/verizon-supports-fcc-plan-reverse-title-ii-classification), T-Mobile (https://newsroom.t-mobile.com/news-and-blogs/t-mobile-on-net-neutrality-vote.htm), and so on. The various trade associations have also issued public facing statements promising to promote and protect an open internet. *See* CTIA's statement (https://www.ctia.org/policy/policy-position-details/open-internet) and NCTA – The Internet & Television Association's statement (https://www.ncta.com/platform/public-policy/reaffirming-our-commitment-to-an-open-internet/), for example.

[12] *E.g.* Title II Order, 30 FCC Rcd at 5656 (para. 127), *see also* nn. 301, 302.

[13] 15 U.S.C. § 45(a)(1), *but see* § 15, generally.

[14] Abbott, Alden, *You Don't Need the FCC: How the FTC Can Successfully Police Broadband-Related Internet Abuses*, May 20, 2015, Heritage Foundation, available at http://www.heritage.org/government-regulation/report/you-dont-need-the-fcc-how-the-ftc-can-successfully-police-broadband#_ftn13.

[15] Fair, Lesley, *TracFone's limits on "unlimited" data lead to $40 million in consumer refunds*, Jan. 28, 2015, FTC, available at https://www.ftc.gov/news-events/blogs/business-blog/2015/01/tracfones-limits-unlimited-data-lead-40-million-consumer.

[16] *Id*.

[17] *See*, *FTC v. AT&T Mobility, LLC*, 835 F.3d 993 (9th Cir. 2016), *rehearing en banc granted by* ___ F.3d ___, 2017 WL 1856836 (2017).

[18] *Id*. Should the FCC reinstate the Title I classification of ISPs, the FTC's jurisdiction would likely be restored.

[19] Waller, *Consumer Protection in the United States* at 17.

[20] *E.g.,* Carter, *50-State Report* pp. 7-10.

[21] *See* "Consumer Protection: An Overview of State Laws and Enforcement", n.9, supra.

immoral, unethical, oppressive, or unscrupulous,' and 'causes substantial injury to consumers."[22] A minority of states shifted with the FTC in 1980, when it "shifted the focus of the federal test primarily to the substantial consumer injury component, making it significantly more difficult for the government to establish a violation."[23]

A thorough search for published cases involving complaints against broadband service providers failed to yield (substantial) evidence of the hypothetical harms cited by the Title II Order. [24] This search did indicate, though, most consumer complaints against broadband service providers fall into one of two broad categories: (1) Complaints against service providers regarding pricing, misrepresentation of prices, price gouging, and misrepresentation of service quality;[25] and (2) Complaints against third parties for misuse of internet servers or electronic communications, specifically so-called spammers.[26]

The proposal to Restore Internet Freedom and reclassify Broadband Services as a Title I Information Service will eliminate any unnecessary confusion arising from the application of state utility regulations and legislation

The Title II Order failed to consider the impact of classifying ISPs as telecommunications services. All states regulate either telecommunications services or internet services or a combination of both. The enabling legislation varies, but in all cases presumes the language found in the Communications Act,[27] as amended by the 1996 Telecommunications Act,[28] is clear. The states did not anticipate a unilateral reclassification by a federal commission.

The Title II Order promised to forebear against enforcing some of Title II's more onerous requirements.[29] Both the law and the language of the Order prohibit states from enforcing those provisions which the Commission elected to forebear, which the Commission recognized in 2015.[30] The Title II Order takes preemption a step further than forbearance in the next paragraph, though, purporting to preempt state authority to regulate

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[22] *Id.*
[23] *Id.*, *see also* Carter, *50-State Report* at p. 6.
[24] Supra, n.4.
[25] *E.g. State ex rel. Cooper v. NCCS Loans, Inc.*, 624 S.E.2d 371 (N.C. Ct. App. 2005), *Scott v. Bell Atlantic Corp*., 726 N.Y.S.2d 60 (2001) (Consumer protection laws do not permit actions where the ISP disclosed various conditions that may interrupt services).
[26] *E.g., State ex rel. Miller v. Vertrue, Inc.,* 834 N.W.2d 12 (Iowa 2013) (improper use of the internet to sell club membership to the elderly violates state consumer protection laws, among other standards); *Joffe v. Acacia Mortg. Corp.*, 121 P.3d 831 (Ariz. Ct. App. 2005) (Federal CAN-SPAM Act prohibits the use of internet-to-phone technology to send spam SMS messages); *State v. Heckel*, 24 P.3d 404 (Wash. 2001) (Enforcement of state's Consumer Protection Act against spammer does not violate the dormant Commerce Clause).
[27] *E.g.*, 47 U.S.C. §§ 201, *et seq*. and 1301, *et seq.*
[28] Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).
[29] By the Title II Order's own acknowledgement, promises to forbear are not reliable and should be all-but ignored when contemplating what *may* happen in the future. *See* 30 FCC Rcd at 5656 (para. 127), and nn. 301, 302. Based on such logic, one could apply the same proposition to the Order's promised forbearance and conclude that such promises "do not have the force of a legal rule that prevents [the Commission] from [applying Title II's more onerous provisions] in the future." *See id.*
[30] *See, e.g.* 47 U.S.C. § 160(e), Title II Order, 30 FCC Rcd at 5803, para. 432.

broadband services in ways inconsistent with the Order.[31] Despite the claims of broad preemption, the paragraph continues, stating the preemption will "proceed on a case-by-case basis in light of the fact specific nature of particular preemption inquiries…."[32]

It is clear from this text that the Title II Order failed to analyze state regulation of broadband activity, including the extent to which states include or exclude broadband access services from public utility regulation. Through the NPRM, and any resultant order, this Commission has the opportunity to examine such state regulatory regimes. At the very least, the proposal to Restore Internet Freedom will restore the *status quo ante* between the Commission and the states, which will allow for a more thoughtful analysis of state regulation of broadband services.

As a caveat, this comment focuses on state laws the Title II Order failed to consider. ISPs may be subject to a myriad of additional city, county, and other local laws because of the Title II classification. From a cursory review of cases since 2015, it appears most of these laws would relate to taxation. For example, in 2016 the Supreme Court of Oregon decided *City of Eugene v. Comcast of Oregon II*, 375 P.3d 446. While the Court decided the case on other grounds, namely whether a local tax conflicted with the Internet Tax Freedom Act, it acknowledged that "the FCC's order subjects the provision of cable modem services to certain telecommunications regulations that were not previously applicable." 375 P.3d at 453, *see also id*. at 452-453, 461.

In the earlier days of the internet, courts refused to classify internet service providers as common carriers. Many of the disputes in which courts participated revolved around public access to ISP resources, such as servers, rather than interpretation of FCC guidance or the Telecommunications Act of 1996. One of the seminal cases, *CompuServe, Inc. v. Cyber Promotions, Inc*.,[33] involved claims between an internet service provider and an email spam company. As part of its analysis, the court dismissed the notion that an ISP could be a public utility under Ohio law.

> The Ohio Supreme Court held that the determination of whether an entity is a "public utility" requires consideration of several factors relating to the "public service" and "public concern" characteristics of a public utility. The public service characteristic contemplates an entity which devotes an essential good or service to the general public which the public in turn has a legal right to demand or receive.[34]

To provide the Commission a better picture of the state regulatory framework, included in this comment are some state law highlights. The highlights focus on states deferring to Commission interpretations of broadband access, or internet access services either expressly or implicitly. *See Table I*, *infra* pp. 7-9. The highlight also includes states where reclassification of internet access services may result in a lack of clarity. *Table II*, *infra*, pp.

[31] *Id.* at 5804, para. 433.
[32] *Id.*
[33] 962 F.Supp. 1015 (S.D. Ohio, 1997)
[34] *Id*. 962 F. Supp. at 1025 (internal citations omitted). The same is true in California. At least one court refused to deem a company as a public forum merely because it connected to the internet. *See Intel Corp. v. Hamidi*, 114 Cal.Rptr.2d 244, 257 (Cal. Ct. App. 2001), *rev'd on other grounds*, 30 Cal. 4th 1342 (Cal. 2003). After the *CompuServe* court announced its ruling, Ohio changed its law to expand the definition of "public utility" to include advanced services, broadband services, and information services. 2010 Ohio Laws 43, *see also* n.6, supra.

10-16. Finally, the highlight includes some states where the reclassification likely makes little difference. *Table III, infra*, pp. 17-19.

The Title II Order also notably lacked an analysis of state court decisions, or federal court decisions interpreting state law. Through these decisions, states have been able to settle, for lack of a better term, aspects of broadband access service regulation. A few cases are noted in the tables to help the Commission understand both the complexities facing states and to support the proposition that restoring the Title I Information Service designation of internet access services will restore states' understanding of its regulations.

Conclusion

State and federal consumer protection laws sufficiently protect consumers from any harms, whether actual or hypothetical. The consumer protection regimes provide disaffected consumers the ability to seek redresses from bodies likely to provide them the rapidest resolution to their claims.

The Restoring Internet Freedom proposal is also an opportunity to examine state regulation of utilities or common carriers and restore the balanced, measured approach states developed since the Telecommunications Act of 1996.

Further, since the Title I Information Service designation of broadband service providers reflects a well-thought out approach that respects federalism and state sovereignty, the American Legislative Exchange Council strongly supports the Commission's efforts to restore such a designation through the Restoring Internet Freedom Notice of Proposed Rulemaking.

Respectfully Submitted this 17th Day of July, 2017

/s/
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Director
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Table I
States Where the Title II Order may Subject Access Providers to State Utility Regulations:

State	Broadband, Broadband Service, Internet, or Internet Service, Defined	Telecommunications Service Provider, Public Utility, or Common Carrier Defined	Explanation
District of Columbia	Undefined, but per DC ST. § 34-2008(c): "Nothing in this chapter shall be construed to contravene any provision in the federal Telecommunications Act of 1996 passed by the U.S. Congress in January and signed into law by President Clinton in February or to be inconsistent with the findings of the PSC in a proceeding pursuant to § 34-2002(k)."	"'Telecommunications carrier' means any provider of telecommunications services, except that the term does not include aggregators of telecommunications services as defined in § 226 of the Communications Act of 1934 (47 U.S.C. § 226). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services and is a service that the United States Federal Communications Commission determines shall be treated as common carriage." DC St. § 34-2001(17)	DC expressly subjects telecommunications service providers to utility regulation and defers to the Commission's definitions. Broadband service providers redefined as Title II telecommunications services would find themselves subject to DC's utility regulations.
Ohio	"'Internet protocol-enabled services' means any services, capabilities, functionalities, or applications that are provided using internet protocol or a successor protocol to enable an end user to send or receive communications in internet protocol format or a successor format, regardless of how any	"'Telecommunications carrier' has the same meaning as in the 'Telecommunications Act of 1996,' 110 Stat. 60, 47 U.S.C. 153." Oh. Rev. Code § 4927.01(12) (2015); *See also* Oh. Rev. Code §§ 4905.02(A)(5)(a)-(e) (2012) (defining public utility to include providers of advanced	At least one federal court in Ohio ruled that internet service providers are not common carriers. In *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F.Supp. 1015 (S.D. Ohio, 1997), the District Court relied on an older Ohio Supreme Court case about landfills to determine that internet

	particular such service is classified by the federal communications commission, and includes voice over internet protocol service." Oh. Rev. Code § 4927.01(6) (2015)	services, information services, and broadband services "however defined or classified by the federal communications commission [sic]" and 4905.042 (2005) (prohibits the state commission from exercising jurisdiction over advance service providers that is inconsistent with federal law or regulations).	service providers are not "public utilities" because the public does not possess a legal right to demand or receive service. 962 F.Supp. at 1025. *See also A & B Refuse Disposers, Inc., v. Ravenna Twp. Board of Trustees*, 596 N.E.2d 423 (Ohio 1992). After the *CompuServe* court announced its decision, Ohio changed its laws, expanding the definition of "public utility" to include the services listed in the adjacent cell. 2010 Ohio Laws 43.
South Dakota	"'Broadband network,' the broadband network extends the range of fully switched, addressable, robust transport services over the fiber network which increase in multiples of OC-1 (51.84 Mbps), including OC-3 (155.52 Mbps) and OC-12 (622.08 Mbps)." S.D. Codified Laws § 49-31-1(3)	"'Common carrier,' anyone who offers telecommunications services to the public." S.D. Codified Laws § 49-31-1(6) "'Telecommunications service,' the transmission of signs, signals, writings, images, sounds, messages, data, or other information of any nature by wire, radio, lightwaves, electromagnetic means, or other similar means. It does not include the provision of terminal equipment used to originate or terminate such service, broadcast transmissions by radio, television, and satellite stations regulated by the Federal Communications	Broadband does not appear to be exempted from "telecommunications service." The South Dakota utility commission has "general supervision and control of all telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation." S.D. Codified Laws § 49-31-3. Since South Dakota both fails to exempt broadband networks or access services from the definition of "telecommunications

		Commission and one-way cable television service." S.D. Codified Laws § 49-31-1(29)	service" and since the state appears to defer to the FCC for jurisdictional interpretation, it is likely the Title II Order would ensure broadband access services and networks are subject to state public utility regulation.
Vermont	Undefined	"'Telecommunications service' means the transmission of any interactive electromagnetic communications that passes through the public switched network. The term includes transmission of voice, image, data, and any other information, by means of wire, electric conductor cable, optic fiber, microwave, radio wave, or any combinations of such media, and the leasing of any such service. Vt. Stat. Ann. Tit. 30 § 7501(b)(8)	The authority of the Board or Public Service Department appears coterminous with the authority granted in the Telecommunications Act of 1996 and any authority granted by the Commission. *See e.g.*, 30 Vt. Stat. Ann. § 20(b)(10), (14) and 30 Vt. Stat. Ann. §§ 7501, *et seq.*

Table II
States Where the Impact of Title II is Unclear and Access Providers May Be Subject to State Utility Regulation

State	Internet Access, Broadband, or other relevant terms defined	Telecommunications, Public Utility, or Common Carrier Definition	Lack of Clarity Regulatory Explained
Alabama	"'Broadband Service' or 'Broadband Enabled Service.' Any service that consists of or includes a high-speed access capability to transmit at a rate that is not less than 200 kilobits per second either in the upstream or downstream direction, and either of the following: a. Provides computer processing, information storage, information content or protocol conversion, including any service applications or information service provided over such high-speed access service. b. Is used to provide access to the Internet." Ala. Code § 37-2A-2(2)	"'Telecommunications Carrier.' Any provider of telecommunications services. A telecommunications carrier shall be treated as subject to this chapter only to the extent that it is engaged in providing telecommunications service. (22) 'Telecommunications Service.' The offering of telecommunications for a fee directly to the public, or to any classes of users as to be effectively available directly to the public, regardless of the facilities used. The term does not include the provision of commercial mobile service under Section 332(c) of the Federal Communications Act of 1934." Ala. Code § 37-2A-2(21), (22).	Alabama law expressly exempts "broadband service[s]" and "broadband enabled service[s]" from state commission regulation. However, the same provision prohibits the commission from imposing obligations "that exceeds in degree or differs in kind from the requirements of the Federal Communications Commission." Ala. Code § 37-2A-4(a) There are no state court decisions interpreting this provision. As such, it is unclear the impact the Title II Order would have on the regulatory regime in Alabama.
California	"'Broadband' means any service defined as broadband in the most recent Federal Communications Commission inquiry pursuant to Section 706 of the	As relating to telephone companies, the Cal. Pub. Utility Code clearly regulates telephone companies and telecommunications services. *See* Cal. Pub. Util. Code §§ 2871-	California expressly defers to the FCC regarding the definition of broadband. In the Digital Infrastructure and Video Competition Act of 2006 (Cal. Pub. Util. Code §§ 5830, *et*

	Telecommunications Act of 1996 (P.L. 104-104).” Cal. Pub. Util. Code § 5830(a)	2897.	*seq.*), the state preempted local regulation of “franchise-granting authority” for “video services,” subjected broadband access providers to the state utility commission and placed restrictions on the extent to which it may regulate providers. *See*, *e.g.* Cal. Pub. Util. Code §§ 5830, 5840.
Colorado	“‘Broadband’ or ‘broadband service’ means broadband internet service provided over a broadband network (3.7) ‘Broadband network’ means the plant, equipment, components, facilities, hardware, and software used to provide broadband internet service at measurable speeds of at least four megabits per second downstream and one megabit per second upstream or at measurable speeds at least equal to the federal communications commission's definition of high-speed internet access or broadband, whichever is faster, with: (a) Sufficiently low latency to enable the use of real-time communications, including voice-over-	“The term ‘public utility’, when used in articles 1 to 7 of this title, includes every common carrier, pipeline corporation, gas corporation, electrical corporation, telephone corporation, water corporation, person, or municipality operating for the purpose of supplying the public for domestic, mechanical, or public uses and every corporation, or person declared by law to be affected with a public interest, and each of the preceding is hereby declared to be a public utility and to be subject to the jurisdiction, control, and regulation of the commission and to the provisions of articles 1 to 7 of this title.” Colo. Rev. Stat. Ann. § 40-1-103(1)(a)(I)	Colorado exempts “information services” and “internet-protocol enabled services” from regulation pursuant to the state public utilities law. Colo. Rev. State. Ann. § 40-15-401(1) The state defers, though, to the U.S. Code for the definition of “information service.” There are no state court cases interpreting internet- or broadband-related definitions set forth in Colo. Rev. Stat. Ann. § 40-15-102. Based on the definitions of “public utility” and the reliance on federal law, it is unclear whether the Title II Order would have any impact on Colorado’s internet service provider regulatory regime.

	internet-protocol service; and (b) Either no usage limits or usage limits that are reasonably comparable to those found in urban areas for the same technology. (10) 'Information services' has the same meaning as set forth in 47 U.S.C. sec. 153. (14.5) 'Internet-protocol-enabled service' or 'IP-enabled service' means a service, functionality, or application, other than voice-over-internet protocol, that uses internet protocol or a successor protocol and enables an end user to send or receive a voice, data, or video communication in internet protocol format or a successor format, utilizing a broadband connection at the end user's location. " Colo. Rev. Stat. Ann. § 40-15-102(3.3), (3.7), (10), (14.5)		
Connecticut	Undefined[35]	"'Public service company' includes electric distribution, gas, telephone, pipeline, sewage, water	C.G.S.A. § 16-247f explanation of regulations [Without a statutory

[35] Entities wishing to offer video and data services may be exempt from regulation by the Connecticut Department of Public Utility Control. *See Southern New England Telephone Co. v. Connecticut Department of Public Utility Controls*, 44 Conn. L. Rptr. 482 (Conn. Super. Ct. 2007) (unpublished) (ordering the PUC to issue a video franchise where petitioner sought to expand its offerings to include voice, data, and video services.)

		and community antenna television companies and holders of a certificate of cable franchise authority… 'Telephone company' means a telecommunications company that provides one or more noncompetitive or emerging competitive services, as defined in section 16-247a… 'Telecommunications company' means a person that provides telecommunications service, as defined in section 16-247a, within the state, but shall not mean a person that provides only (A) private telecommunications service, as defined in section 16-247a, (B) the one-way transmission of video programming or other programming services to subscribers, (C) subscriber interaction, if any, which is required for the selection of such video programming or other programming services, (D) the two-way transmission of educational or instructional programming to a public or private elementary or secondary school, or a public or independent	definition of broadband, internet service provider, information service, or similar term it is difficult to determine whether the Title II Order would alter the regulatory paradigm. Based on the unpublished case referenced in n__ of this Appendix, it is possible internet service providers could escape additional state regulation, but that case was not decided by Connecticut's appellate courts.

		institution of higher education, as required by the authority pursuant to a community antenna television company franchise agreement, or provided pursuant to a contract with such a school or institution which contract has been filed with the authority, or (E) a combination of the services set forth in subparagraphs (B) to (D), inclusive, of this subdivision." Conn. Rev. Stat. 16-1(a)(3), (17), (19)	
Tennessee[36]	"As used in this part, 'broadband services' means any service that consists of or includes a high-speed access capability to transmit at a rate that is not less than two hundred kilobits per second (200 Kbps), either in the upstream or downstream direction and either: (A) Is used to provide access to the Internet;	"'Public utility' means every individual, copartnership, association, corporation, or joint stock company, its lessees, trustees, or receivers, appointed by any court whatsoever, that own, operate, manage or control, within the state, any… telephone, telegraph, telecommunications services, or any other	Tennessee seems to expressly exempt broadband access services from the purview of its regulatory authority. Tenn. Code. Ann. § 65-5-202(a)(2). However, one provision of its statutes opens the door for the state regulatory authority: "Nothing in this part shall permit any carrier to treat services that constitute

[36] The Tennessee Court of Appeals in 2003 addressed the question of whether "computer information services" could be considered "telecommunications services" for purposes of the state's retail tax, which permitted the levying of sales and use taxes on the latter form of service. The court determined the state could not extend the tax on two separate, but related, grounds. First, the court noted the tax's enabling legislation passed in 1989. The court then stated that "an invention not in use when the statute was passed cannot have been within the intent of the legislature." Second, the court noted the federal definitions of basic and advanced telecommunications services. Based on this distinction, the court determined "companies that provide communications services through the use of the internet, are not regulated as 'telecommunications service providers.'" *Prodigy Services Corp. Inc. v. Johnson*, 125 S.W.3d 413, 416-417, 419 (Tenn. Ct. App. 2003), *but cf. Comcast Corp. v. Department of Revenue*, 337 P.3d 768 (Ore. 2014) ("The fact that internet access service did not exist in 1973 [when Oregon passed its telecommunications tax] does not place it beyond the reach of the policy that the legislature enacted" 337 P.3d at 328-329.)

	or (B) Provides computer processing, information storage, information content or protocol conversion, including any service applications or information service provided over the high-speed access service." Tenn. Code Ann. § 65-5-202(a)(1)	like system..." Tenn. Code Ann. § 65-4-101(6)(A) "'Telecommunications service provider' means any incumbent local exchange telephone company or certificated individual or entity, or individual or entity operating pursuant to the approval by the former public service commission of a franchise within § 65-4-207(b), authorized by law to provide, and offering or providing for hire, any telecommunications service, telephone service, telegraph service, paging service, or communications service similar to such services unless otherwise exempted from this definition by state or federal law." Tenn. Code Ann. § 64-4-101(7)	telecommunications services under federal law as nontelecommunications services for any purpose under state law." Tenn. Code Ann. § 65-5-202(b). It is, thus, unclear whether the Title II Order impacts state regulatory oversight of broadband access services.
Wyoming	Undefined	"In addition to the powers exercised pursuant to the provisions of W.S. 37-15-408, the commission has the power to: (vi) Regulate telecommunications companies only as provided for in this chapter; and (vii) Exercise authority as expressly delegated under the Federal Communications Act of	Wyoming legislation prevents the state regulatory authorities from exercising jurisdiction over "nongovernmental providers of telecommunications services or broadband services." Wyo. Stat. § 9-2-2906. Later provisions, as quoted in this row, provide the regulatory

		1934, as amended." Wyo. Stat. § 37-15-401(a).	agencies the ability to "exercise authority as expressly delegated under the" federal Communications Act. Since the prior Title II Order derived, in large part, from the Communications Act, the exact scope of this newly found authority as applied to Wyoming public utility regulators is unclear.

Table III
Access Providers Not Subject to State Regulatory Authority: Examples of Where the Title II Order Makes No Difference

State	Internet Access, Broadband, or other relevant terms defined	Telecommunications, Public Utility, or Common Carrier Definition	Lack of Clarity Explained
Kentucky	"'Broadband' means any service that is used to deliver video or to provide access to the Internet and that consists of the offering of the capability to transmit information at a rate that is generally not less than two hundred (200) kilobits per second in at least one direction; or any service that combines computer processing, information storage, and protocol conversion to enable users to access Internet content and services. Nothing in this definition shall be construed to include any intrastate service, other than digital subscriber line service, tariffed at the commission as of July 15, 2004." Ky. Rev. Stat. §278.5461(1)	"'Utility' means any person except a regional wastewater commission established pursuant to KRS 65.8905 and, for purposes of paragraphs (a), (b), (c), (d), and (f) of this subsection, a city, who owns, controls, operates, or manages any facility used or to be used for or in connection with… (e) The transmission or conveyance over wire, in air, or otherwise, of any message by telephone or telegraph for the public, for compensation." Ky. Rev. Stat. § 278.010(3)	Regardless of whether the Commission classifies broadband access providers as Title I Information Services or Title II Telecommunications Services, Kentucky expressly exempts these providers from state utility oversight. *To wit*, "(1) The provision of broadband services shall be market-based and not subject to state administrative regulation. Notwithstanding any other provision of law to the contrary except as provided in subsections (3) and (4) of this section, no agency of the state shall impose or implement any requirement upon a broadband service provider with respect to the following: (a) The availability of facilities or equipment used to provide broadband services; or (b) The rates, terms or conditions for, or entry into, the provision of broadband service.

			Ky. Rev. Stat. § 278.5462
Nevada	"As used in this section, 'broadband service' means any two-way service that transmits information at a rate that is generally not less than 200 kilobits per second in at least one direction." Nev. Rev. Stat. 704.684(4)	"'Public utility' or 'utility' includes: (b) Any person, other than a provider of commercial mobile radio service, that provides a telecommunication service to the public, but only with regard to those operations which consist of providing a telecommunication service to the public. (c) Any provider of commercial mobile radio service, but such providers: (1) Must be regulated in a manner consistent with federal law; and (2) Must not be regulated as telecommunication providers for the purposes of this chapter." Nev. Rev. Stat. 704.020(1)(b)-(c)	Nevada expressly exempts broadband services from public utility regulation. The statute creating the exemption has a number of exceptions, but with respect to broadband services, those exceptions apply to the Universal Service Fund. While the Title II Order may have created the conditions necessary for the FCC to impose the Universal Service Fee, this action alone would likely not be sufficient to trigger Nevada utility commission jurisdiction over broadband service providers as a whole. "Except as otherwise provided in this section, the Commission shall not regulate any broadband service, including imposing any requirements relating to the terms, conditions, rates or availability of broadband service." Nev. Rev. Stat. 704.684
Wisconsin	Undefined	"'Public utility' means, except as provided in par. (b), every corporation, company, individual, association, their lessees, trustees or receivers appointed	Wisconsin does not appear to define broadband service, internet access service, or other similar term. The state limits its public utility

		by any court, and every sanitary district, town, village or city that may own, operate, manage or control any toll bridge or all or any part of a plant or equipment, within the state, for the production, transmission, delivery or furnishing of heat, light, water or power either directly or indirectly to or for the public. 'Public utility' includes all of the following: 1. Any person engaged in the transmission or delivery of natural gas for compensation within this state by means of pipes or mains and any person, except a governmental unit, who furnishes services by means of a sewerage system either directly or indirectly to or for the public. 2. A telecommunications utility." Wis. Stat. 196.01(5)(a)	commission to "supervise and regulate every public utility." Wis. Stat. § 196.02(1). The definitions of 'public utility', 'telecommunications utilities' and others suggest the commission lacked jurisdiction over telecommunications companies, broadly, unless they provided basic local exchange services. Because Wisconsin's legislature limited the jurisdiction of its utility commission, it is unlikely that the Title II Order granted it authority over internet service providers. *See* Wis. Stat. § 196.01(5), (8m), (9m), (10)